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No. 89-1744

In the Supreme Court of the United States

OCTOBER TERM, 1990

LAVERNA S. BISHOP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Administrator of the Veterans Administration to review certain veterans' disability cases is within the discretionary function exception of the Federal Tort Claims Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) and the order of the district court (Pet. App. 7-9) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1989. A petition for rehearing was denied on February 8, 1990. Pet. App. 6. The petition for a writ of certiorari was filed on May 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Alan H. Bishop served in the United States Navy during World War II and was honorably discharged in

December 1944 due to post-traumatic stress syndrome, or shell shock. In 1946, the Administrator of the Veterans Administration (now the Department of Veterans Affairs) determined that Bishop's condition was service-connected, and that Bishop therefore was eligible for VA disability benefits.[1] In September 1969, the VA rated Bishop's psychoneurosis as 70% disabling. In December 1969, Bishop was determined to be individually unemployable and thus entitled to payment of compensation at the 100% rate notwithstanding his 70% "schedular" rating. See 38 C.F.R. 4.16 (providing that a total disability rating for compensation may be assigned where a disability is ratable at 60% or more according to the VA's disability rating schedule, and the individual is unable to secure employment as a result of a service-connected disability).

In 1982, the Administrator conducted an unemployability review of Bishop's case pursuant to Department of Veterans Benefits Circular 21-82-9 (Circular).[2] The Circular directed VA officials to review the cases of veterans who were receiving compensation, had been rated unemployable, and were 60 years old or older in 1980. Pet. App. 15. Upon a review of Bishop's case that included an interview by a VA examiner, a social survey, and a medical examination, the rating board determined that Bishop's neurosis did not render him completely unemployable and, accordingly, reduced his rating for compensation purposes from 100% to 70%.

Bishop appealed the rating decision to the Board of Veterans Appeals. On May 17, 1984, while his appeal was

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[1] The VA's procedures for awarding service-connected death or disability benefits are described in *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 309-311 (1985).

[2] Circular 21-82-9 is reproduced at Pet. App. 15-19.

pending, Bishop committed suicide. On May 21, 1984, the Board issued a decision reinstating Bishop's rating as individually unemployable. The Board concluded that, although Bishop's depressive neurosis did not warrant a disability rating in excess of 70%, his condition precluded him from engaging in substantially gainful employment. On October 11, 1984, the Administrator determined that Bishop's suicide was a result of his psychoneurosis and therefore was service-connected.

2. Petitioner, Bishop's widow and personal representative, brought an action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for injuries to her husband allegedly caused by the VA's review of his case. Petitioner's amended complaint sought damages for negligent performance of an undertaking to render services, intentional infliction of emotional harm, wrongful death, and wrongful civil proceedings. The United States moved to dismiss, or in the alternative for summary judgment, arguing that the action was barred by the discretionary function exception of the FTCA, 28 U.S.C. 2680(a),[3] as well as by 38 U.S.C. 211(a)(1).[4]

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[3] Section 2680(a), Title 28, U.S.C, provides:

> The provisions of [the FTCA] shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such a statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

[4] Section 211(a)(1) of Title 38, as amended, provides, in part:

> The Administrator shall decide all questions of law and fact necessary to a decision by the Administrator under a law that affects the provision of benefits by the Administrator to veterans or the dependents or survivors of veterans. Subject to [certain enumerated exceptions], the decision of the Administrator as to

The district court dismissed the action for want of jurisdiction, holding that petitioner's "claim in large part questions the merits of the Veterans' Administration's determination of entitlement and * * * § 211 [of Title 38] specifically prevents review of the merits of such a decision." Pet. App. 8. The district court also held that, to the extent petitioner's arguments were directed at the issuance of the Circular, "such a decision involves a discretionary act on the part of the Veterans' Administration," and so cannot be the basis of a suit under the FTCA. Pet. App. 9.

3. The court of appeals affirmed. The court observed that petitioner did not challenge the Administrator's benefits decision, because petitioner "in fact received all of his benefits posthumously." Pet. App. 3. Petitioner instead "apparently argue[d] that the tort consisted either of the Administrator's decision to act under the circular, * * * or of his initial decision to promulgate that circular." *Ibid.* The court of appeals held that, under either theory, the discretionary function exception "present[ed] a firm obstacle to [petitioner's] suit." *Ibid.*

As to the contention that the Administrator's decision to promulgate the Circular gave rise to a cause of action under the FTCA, the court of appeals, relying on *Dalehite* v. *United States*, 346 U.S. 15, 43 (1953), held that "the discretionary act exception fully impedes a suit." Pet. App. 4. As to the contention that the Administrator's action under the Circular violated the FTCA, the court of appeals noted that Section 2680(a) excepts "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." Pet. App. 4.

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any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

Because the court of appeals held that petitioner's action was barred by the discretionary function exception, it had no occasion to consider whether 38 U.S.C. 211(a)(1) also barred the suit. Pet. App. 5.

ARGUMENT

The court of appeals has correctly decided a narrow issue in a way that does not conflict with any decision of this Court or any other court of appeals. In addition, the Circular expired in July 1983 (Pet. App. 19), and therefore presents no question of continuing importance. Consequently, this case does not warrant further review.

1. Petitioner's action is barred by the discretionary function exception of the FTCA. As this Court explained in *Dalehite*,

> [T]he "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.

346 U.S. at 35-36 (footnote omitted). See also *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). Plainly, the Administrator's decision to allocate the VA's limited resources to review of a specified category of veterans' disability cases is precisely the kind of discretionary planning or scheduling that falls within the exception of Section 2680(a).

Petitioner nevertheless contends (Pet. 36-37) that the court of appeals' decision is contrary to this Court's decision in

Berkovitz v. *United States*, 486 U.S. 531 (1988). *Berkovitz* held that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because in such circumstances federal officials have no discretion to exercise. *Id.* at 536-537. Petitioner failed to cite *Berkovitz* to the court of appeals; thus it is not surprising that the court of appeals' opinion does not discuss the case. And, contrary to petitioner's contentions, there is no federal statute, regulation, or policy that deprived the Administrator of discretion to promulgate the Circular or to review Bishop's case.

2. Petitioner asserts (Pet. 37) that the Circular did not comply with 38 U.S.C. 210(c)(1), which requires that "[a]ny rules, regulations, guidelines, or other published interpretations or orders [issued under Title 38] shall contain, immediately following each substantive provision * * *, citations to the particular section or sections of statutory law or other legal authority upon which such rule * * * is based." Petitioner's assertion is incorrect. In fact, the Circular refers to several VA regulations, circulars, and forms. See Pet. App. 15-18. In addition, the Circular contained no "substantive" provisions altering the terms or conditions of eligibility for benefits, but merely directed VA officials to review a specified category of cases under existing substantive provisions.[5]

Petitioner next contends (Pet. 38-39) that the Administrator was required by 38 C.F.R. 1.12 to provide public notice and an opportunity for comment by publishing the

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[5] The courts of appeals have held, in the context of the Administrative Procedure Act, that VA circulars are not substantive law. See, *e.g.*, *First Family Mortgage Corp.* v. *Earnest*, 851 F.2d 843, 844-845 (6th Cir. 1988) (circulars are not "substantive regulations"); *Gatter* v. *Nimmo*, 672 F.2d 343, 347 (3d Cir. 1982) (circulars are "non-substantive rules").

Circular in the *Federal Register*. But the Circular was not a "regulation" subject to Section 1.12, see note 5 *supra*, and in any event fell within the authorized exceptions to the notice-and-comment policy.[6]

In addition, petitioner's arguments based on these asserted procedural irregularities fail for a more basic reason. Such arguments do not show that the Administrator lacked discretion to promulgate the Circular, but, at most, that he failed to follow the correct procedures in exercising his discretion. Congress assuredly did not intend to permit such procedural contentions to be litigated in the context of a tort action for damages under the FTCA. "It is neither desirable nor intended that * * * the legality of regulations * * * should be tested through the medium of a damage suit for tort." *Varig Airlines*, 467 U.S. at 809-810 (quoting *Hearings on H.R. 5373 and H.R. 6463 Before the House Committee on the Judiciary*, 77th Cong., 2d Sess. 28, 33 (1942) (statement of Assistant Attorney General Francis M. Shea)).

Petitioner also contends (Pet. 39-40) that the Circular violated certain substantive regulations of the VA. But none of the regulations cited by petitioner deprived the Administrator of discretion to issue the Circular, or to review petitioner's case. Thus, 38 C.F.R. 3.327, relied on by petitioner (Pet. 39), is not a blanket prohibition against reexamination. While subsection (b) provides that re-

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[6] Section 1.12, Title 38 C.F.R., provides, in part:

> It is the policy of the Veterans' Administration to afford the public general notice, published in the *Federal Register*, of proposed regulatory development, and an opportunity to participate in the regulatory development in accordance with the provisions of the Administrative Procedure Act (APA). All written comments received will be available for public inspection. Exceptions to the policy of permitting public participation in the regulatory development may be authorized * * * when: (a) the proposed regulations consist of interpretative rules, general statements of policy, or rules of [VA] organization procedure or practice * * *.

examinations will not be scheduled in certain circumstances, subsection (d) specifically states that "[t]he policy as to reexaminations will not be construed as modifying in any way the right of rating agencies to request such additional medical opinions, examinations, or periods of hospital observation as may be necessary to furnish complete evidence on which rating decisions will be based." Clearly, the accommodation of these provisions within this statement of policy is a matter calling for the exercise of discretion.[7] Cf. *Tietjen v. United States Veterans Admin.*, 692 F. Supp. 1106, 1109 (D. Ariz. 1988) (deferring to Secretary's discretion), aff'd, 884 F.2d 514 (9th Cir. 1989).

Moreover, contrary to petitioner's assertions (Pet. 39), nothing in the Circular is inconsistent with 38 C.F.R. 3.343(a) (which requires that reduction of a 100% rating for other than individual unemployability be supported by an examination showing "material improvement" in the recipient's physical or mental condition), 38 C.F.R. 3.343(c) (which requires that reduction of a 100% rating based upon individual unemployability be supported by clear and convincing evidence of "actual employability") or 38 C.F.R. 4.132 (the schedule of ratings for mental disorders). Indeed, the Circular provided that "[n]o development is to be undertaken if the evidence was adequate to support the finding of individual unemployability at the time of the grant, unless subsequent evidence is of record establishing a reasonable probability the veteran is employable," but that "[t]here should be no reluctance to undertake development of un-

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[7] To avoid any possible ambiguity, the Secretary has proposed to amend 38 C.F.R. 3.327 to state expressly that "[p]aragraphs (b) and (c) of this section provide general guidelines for requesting reexaminations, but shall not be construed as limiting VA's authority to request reexaminations, or periods of hospital observation, at any time in order to ensure that a disability is accurately rated." 55 Fed. Reg. 4199, 4200 (1990).

protected cases * * * if the rating granting individual unemployability was clearly erroneous."[8] Pet. App. 16-17.

In sum, the Administrator's decision to promulgate Circular 21-82-9 was a discretionary decision, grounded in considerations of public policy, that Congress sought to preclude from being "tested through the medium of a damage suit for tort." *Varig Airlines,* 467 U.S. at 809-810. Accordingly, petitioner's suit under the FTCA was correctly dismissed for want of jurisdiction.[9]

3. Finally, petitioner's claim is also barred by 38 U.S.C. 211(a)(1), which provides that the Administrator's decisions as to all "questions of law and fact necessary to a decision * * * under a law that affects the provision of benefits by the Administrator to veterans or the dependents or survivors of veterans" are not subject to review in any judicial proceeding. In *Johnson* v. *Robison*, 415 U.S. 361 (1974), the Court observed that this provision "would appear to be aimed at review * * * of those decisions of law or fact that arise in the *administration* by the [VA] of a *statute* providing benefits for veterans." *Id.* at 367. The Court recognized that

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[8] Petitioner does not suggest that VA officials negligently misapplied the provisions of the Circular in her husband's case. Thus any claim based on the application of the Circular to Bishop is barred as a "claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. 2680(a).

[9] Contrary to petitioner's contention (Pet. 31), there is no conflict between the court of appeals' decision in this case and the decision of the District of Columbia Circuit in *Doe* v. *Stephens,* 851 F.2d 1457 (1988). In *Stephens*, the District of Columbia Circuit reiterated the *Berkovitz* holding that the discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment, but went on to hold that the plaintiff in that case had cited no regulations violated by the government that "meaningfully cabin[ed] the U.S. Attorney's ordinarily discretionary authority to issue a subpoena." *Id.* at 1462-1463.

the purpose of the no-review clause is two-fold: "(1) to insure that veterans' benefits claims will not burden the courts and the [VA] with expensive and time-consuming litigation, and (2) to insure that the technical and complex determinations and applications of [VA] policy connected with veterans' benefits decisions will be adequately and uniformly made." *Id.* at 370. The Administrator's decision to issue the Circular, and the application of the Circular to Bishop, clearly involved "questions of law and fact" arising in the VA's administration of the veterans' benefit statutes. The language and purpose of Section 211(a)(1) preclude the use of the FTCA as a means of obtaining judicial review of the Administrator's determination in this case, and provide an independent basis for dismissing petitioner's suit.[10] See *Tietjen* v. *United States Veterans Admin.*, 884 F.2d 514, 515 (9th Cir. 1989).

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[10] In 1988, Congress passed the Veterans' Judicial Review Act, Pub. L. No. 100-687, § 101, 102 Stat. 4105, which provides that decisions of the Board of Veterans Appeals may be appealed to a newly-created Article I court, the United States Court of Veterans Appeals (CVA). 38 U.S.C. 4051-4052. Decisions of the CVA are subject to review only in the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 4092. These provisions are not applicable to petitioner's case, since the 1988 legislation applies only to cases in which a "notice of disagreement" was filed on or after November 18, 1988 (see 102 Stat. 4122), and Bishop filed a "notice of disagreement" in January 1983 (Gov't C.A. Br. 3).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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